No. 21,016

IN THE

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellant and Cross-Appellee,

vs.

E. B. WELCH,
Appellee and Cross-Appellant.

PETITION FOR REHEARING BY CROSS-APPELLANT

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable Oliver B. Hamlin, Jr., Circuit Judge; Frederick G. Hamley, Circuit Judge; and Ben C. Duniway, Circuit Judge:

Cross-Appellant, E. B. Welch, hereby petitions for a rehearing on his Cross-Appeal, respectfully requesting this Court to reconsider that portion of the decision and judgment entered on April 21, 1967 in this action regarding the issue of contributory negligence, on the following grounds:

1. Prejudicial omission of a material fact: The record below shows without conflict that no help or helpers (men) were in fact available to aid Cross-

Appellant, had he requested help in connection with the assigned task (Goodheim, 7-8; 25-26; R. II, 69; R. II, 68; Pak 10, 25-26, 33).[1] The Court of Appeals omitted this material fact from its opinion; had the Court of Appeals considered this undisputed fact, the finding of the District Judge must be reversed on the issue of contributory negligence as clearly erroneous, because Cross-Appellant's failure to request help, *where no help was in fact available,* could not then have contributed to the occurrence of the accident as a matter of law.

2. The decision of the Court of Appeals is in conflict with the holding of the Third Circuit in *Sizemore v. United States Lines Co.,* 323 F. 2d 774 (3rd Cir., 1963) affirming 213 F. Supp. 76, 81-83 (E.D. Pa., 1962). Before the rule of comparative fault and divided damages can be applied, negligence, if any, on the part of the injured seaman must be shown to have been a proximate cause or to have at least substantially contributed to the happening of the accident.

In this regard the decision of the Court of Appeals is also contrary to the law of the land on the issue of contributory fault (see Restatement of Torts, 2d §465 (1)).

3. Cross-Appellee (the shipowner-employer) did not sustain its burden of proof on the issue of con-

[1]All the evidence on no help being available to Cross-Appellant and the reasons for this unusual situation aboard the ship on the afternoon of the accident are set forth verbatim from the record for convenient reference in the Brief of Appellee and Cross-Appellant, pages 30-31, and in Cross-Appellant's Reply Brief, pages 2-5 on file herein.

tributory negligence in that the record below discloses a complete failure of proof on the vital element of causal connection between Cross-Appellant's omission to request help and the resultant accident.

For the foregoing reasons, it is respectfully submitted that a rehearing on Cross-Appeal be granted; that the Decree of the District Court be affirmed except with regard to the finding of contributory negligence on Cross-Appellant's part, and in that regard, the Decree should be set aside with directions to the Court below to enter a new decree in the total amount of Appellee and Cross-Appellant's damages as found by the District Judge in the sum of Thirty-eight Thousand Four Hundred Fifty ($38,450.00) Dollars with legal interest from November 24, 1965 and costs to the Appellee and Cross-Appellant.

Dated, San Francisco, California,
May 18, 1967.

JARVIS, MILLER & STENDER,
MARTIN J. JARVIS,
EUGENE A. BRODSKY,
By MARTIN J. JARVIS,
Attorneys and Proctors for Appellee, Cross-Appellant and Petitioner.

CERTIFICATE OF COUNSEL

I certify that this Petition for Rehearing is not interposed for delay and that in my judgment, it is well founded.

MARTIN J. JARVIS,
Attorney and Proctor for Appellee, Cross-Appellant and Petitioner.